E. SCOTT PRUITT
ADMINISTRATOR

March 1, 2018

The Honorable Phil Scott
Office of the Governor
109 State Street, Pavilion
Montpelier, VT 05609

RE: Policy Update on EPA Programmatic of Biomass and the Forest Products Industry

Dear Governor Scott:

Understanding the importance of the forest products industry to the State of Vermont, and recognizing the environmental, economic, and social benefits our nation as a whole derives from its vast forest resources, I write to highlight the work the Environmental Protection Agency (EPA) has undertaken and is continuing to undertake to advance and promote the responsible use of those forest resources.

On April 13, 2017, in accordance with President Trump's Executive Order 13777, *Enforcing the Regulatory Reform Agenda*, EPA sought comment on those unnecessary regulatory barriers that should be targeted for repeal, replacement, or modification. Among the over 60,000 comments received, members of the forest and forest products community highlighted a number of concerns with EPA's past regulatory treatment of the industry. Top concerns included whether EPA had to date failed to take proper account of the reality that energy derived from biomass may in appropriate circumstances be recognized as carbon neutral; the treatment in Clean Air Act permitting decisions of biogenic carbon dioxide (CO_2) emissions; and the Agency's own procurement recommendations for wood and lumber products.

By way of further background, in 2011, EPA had submitted to the Scientific Advisory Board (SAB) a "Draft Accounting Framework for Biogenic CO_2 Emissions from Stationary Sources." That draft accounting framework sought to identify and outline the scientific and technical considerations that come into play in ascertaining whether the production, processing, and use of biomass materials at stationary sources for energy is indeed carbon neutral. The Agency updated the accounting framework in 2014. Most recently, EPA announced that, after seven years of ongoing review and analysis of this challenging issue, the SAB had yet to reach consensus. The SAB process continues. Meanwhile, the Agency recently received explicit direction from Congress in the *Consolidated Appropriations Act of 2017*, which urged the proactive recognition of biomass

as being both carbon-neutral and a source of renewable energy. Spurred on by this congressional action, which had occurred in conjunction with Executive Order 13783, *Promoting Energy Independence and Economic Growth*, a multi-agency effort has now been initiated between EPA, the Department of Energy, and the Department of Agriculture, with the focused goal of establishing a mechanism for federal cooperation and consistency on the use of biomass, including forest-derived biomass, for energy.

For its specific part, EPA has incorporated into its ongoing review of and improvement to Clean Air Act permitting programs generally a concerted effort to develop a range of options consistent with a carbon-neutral policy for biomass from forests and other lands and sectors. Unquestionably, by providing certainty for the treatment of biomass throughout the Agency's permitting decisions, the use of biomass energy will be bolstered, to the benefit not only to the forest products industry but the environment as well, while furthering the Administration's goal of energy dominance.

EPA is also developing actions to clarify its own federal procurement recommendations, issued by the prior Administration in September 2015, with an eye towards assessing their value and relevance going forward. Unaccountably, as initially drafted, those recommendations only recognized a single forest certification standard as qualifying for federal procurement opportunities. This had the unfortunate, and wholly unwarranted, effect of making a large majority of responsibly managed forests, including those certified by the Sustainable Forestry Initiative and the American Tree Farm System, ineligible to participate. Today, EPA recognizes there is a much broader reach of responsibly managed forests and so is working to guarantee that any procurement recommendations are consistent with this broader understanding. Additionally, EPA is working to ensure, as appropriate, either parity with or deferral to USDA's preexisting mandatory purchasing requirements for federal agencies set out under its BioPreferred Program.

As you and I both recognize, continuing to be responsible stewards of our nation's forests and lands while utilizing all domestic forms of biomass to meet our energy needs are mutually compatible goals. By further incorporating these sources into an "all of the above" energy portfolio, the Agency will expand the economic potential of our nation's forests, while at the same time ensuring states like Vermont are able to determine the best energy sources to meet their local economic and environmental needs. I look forward to continuing to work with you and the broad range of interested stakeholders to provide clarity and incorporate consistent treatment of biomass throughout the range of EPA's regulatory programs.

Respectfully yours,

E. Scott Pruitt

E. SCOTT PRUITT
ADMINISTRATOR

March 1, 2018

The Honorable Paul R. LePage
Office of the Governor
1 State House Station
Augusta, ME 04333

RE: Policy Update on EPA Programmatic of Biomass and the Forest Products Industry

Dear Governor LePage:

Understanding the importance of the forest products industry to the State of Maine, and recognizing the environmental, economic, and social benefits our nation as a whole derives from its vast forest resources, I write to highlight the work the Environmental Protection Agency (EPA) has undertaken and is continuing to undertake to advance and promote the responsible use of those forest resources.

On April 13, 2017, in accordance with President Trump's Executive Order 13777, *Enforcing the Regulatory Reform Agenda*, EPA sought comment on those unnecessary regulatory barriers that should be targeted for repeal, replacement, or modification. Among the over 60,000 comments received, members of the forest and forest products community highlighted a number of concerns with EPA's past regulatory treatment of the industry. Top concerns included whether EPA had to date failed to take proper account of the reality that energy derived from biomass may in appropriate circumstances be recognized as carbon neutral; the treatment in Clean Air Act permitting decisions of biogenic carbon dioxide (CO_2) emissions; and the Agency's own procurement recommendations for wood and lumber products.

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Respectfully yours,

E. Scott Pruitt

STATE OF INDIANA
OFFICE OF THE GOVERNOR
State House, Second Floor
Indianapolis, Indiana 46204

Eric Holcomb
Governor

March 9, 2018

VIA FEDERAL EXPRESS AND
ELECTRONIC MAIL: Pruitt.scott@epa.gov

The Honorable Scott Pruitt
Administrator
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

RE: Petition for Reconsideration and Request for Agency Stay Pending Reconsideration of Final Rule Designating Huntington Township, Huntington County, Indiana, Nonattainment under Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard—Round 3

EPA Docket ID No. EPA-HQ-OAR-2017-0003

Dear Administrator Pruitt:

On behalf of the State of Indiana, by and through Governor Eric J. Holcomb, and the Indiana Department of Environmental Management (IDEM), the undersigned petitions the U.S. Environmental Protection Agency ("EPA" or the "Agency") to reconsider the final rule that designated Huntington Township, Huntington County, Indiana as nonattainment in the Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard—Round 3 ("2018 Designations"). 83 Fed. Reg. 1098, (pp. 1121-1122), (January 9, 2018). This rule becomes effective on April 9, 2018, 90 days after the January 9, 2018 Federal Register publication date. Therefore, this petition for reconsideration is timely. 42 U.S.C. § 7607(b)(1).[1]

[1] Concurrent with the filing of this petition for reconsideration, pursuant to §7607(b), on March 9, 2018, the State of Indiana, by and through the Indiana Office of Attorney General, filed for judicial review of EPA's nonattainment designation for Huntington Township in Huntington County, Indiana in the Court of Appeals for the District of Columbia Circuit.

I. INTRODUCTION

On January 9, 2018, EPA published the 2018 Designations. 83 Fed. Reg. 1098. *See* Exhibit 1. This rule establishes air quality designations under the revised Primary National Ambient Air Quality Standard for Sulfur Dioxide ("2010 SO_2 NAAQS")(75 Fed. Reg. 35,520) for areas under Round 3 scrutiny. Of the areas considered in Round 3, six areas were designated as nonattainment and twenty-three areas were designated as unclassifiable; the rest of the areas covered in Round 3 were designated as attainment/unclassifiable. One of the six areas designated as nonattainment is Huntington Township, a political subdivision of Huntington County, Indiana. The Indiana Department of Environmental Management ("IDEM") is the state agency in Indiana that must develop and submit to EPA a State Implementation Plan ("SIP") within 18 months of the effective date of the 2018 Designations that meets the requirements of §§ 172(c) and 191-192 (42 U.S.C. §§ 7502 and 7514-7514a) of the Clean Air Act ("CAA") and provide for attainment of the NAAQS in Huntington Township, Huntington County, Indiana ("Huntington Township") as expeditiously as practicable, but not later than 5 years from the effective date of the 2018 Designations. 83 Fed. Reg. 1098 at 1100. IDEM submits this Petition for Reconsideration ("Petition") pursuant to § 307(d)(7)(B) (42 U.S.C. § 7607) of the CAA of EPA's designation of Huntington Township as nonattainment for the 2010 SO_2 NAAQS. *Id.* at 1122.

Huntington Township was the only area in Indiana that was designated as nonattainment in the 2018 Designations. IDEM requests that EPA reconsider the nonattainment designation of Huntington Township and instead designate the area as unclassifiable because EPA abused its discretion in its designation of a small SO_2 source located in Huntington Township as a "source of concern" by using a justification based on inappropriate considerations and *invalid* data concerning the source's emissions.

The State of Indiana and IDEM maintain that the small source of SO_2 in Huntington Township should have never been designated as a "source of concern" in the first instance and that EPA can justify a reversal of its designation of nonattainment by treating the information it has for the source in Huntington Township in the same manner that it has for other similarly situated demographic areas with sources that emit as much or more SO_2. That is, EPA should make the determination without consideration of faulty data that is derived as part of an unresolved EPA Region V enforcement action.

The reconsideration and reversal of the Huntington Township nonattainment designation under the 2010 SO_2 NAAQS is supported for the following reasons:

(1) EPA, by and through its Office of Enforcement and Compliance Assurance ("OECA") was arbitrary and capricious, and abused its discretion in identifying a mineral wool manufacturing plant, U.S. Minerals Products d/b/a Isolatek International ("Isolatek"), as a "source of concern" to be characterized under the Data Requirements Rule at 40 CFR 51, Subpart BB ("DRR") for the 2010 1-Hour SO_2 NAAQS designations;

(2) EPA's decision to select Isolatek as a "source of concern" and subject to scrutiny under the DRR was the result of impermissible commingling of EPA's enforcement and regulatory functions that result in a deprivation of due process for both the State of Indiana and Isolatek;

(3) EPA did not consistently and uniformly apply the approach taken with Isolatek to other similarly situated sources and demographic areas in area designations using the DRR and, in fact, did not deem other similar or larger sources within Indiana as "sources of concern" even though emission dispersion modeling would indicate that emissions from these similar or larger sources affect much larger populations than the relatively rural area within Isolatek's area of emission dispersion;

(4) EPA's nonattainment designation was based on the type of modeling data that is more appropriate for New Source Review permitting purposes and is in direct conflict with the DRR. Additionally, the data used was based on "in-house" stack testing done by Isolatek performed during a period of abnormal operations. The result is that the modeling conducted by EPA and used for DRR purposes was not representative of Isolatek's operations due to the use of inaccurate assumptions and inputs;

(5) EPA was arbitrary, capricious and abused its discretion in designating an area as nonattainment when the source (Isolatek) should not have been included in the DRR

process to begin with and the modeling data used was inappropriate, misleading and in direct conflict with EPA's expressed intent of the purpose of the DRR at the onset and during the rulemaking process; and

(6) The result of EPA's egregious actions in this case will likely result in Isolatek permanently shutting down its operations in Indiana or Huntington Township being permanently designated as nonattainment for SO_2.

II. SOURCE DESCRIPTION AND HISTORY

Isolatek is a manufacturer of acoustic and thermal mineral fiber insulation. Isolatek's process uses slag produced from steel-making that is melted at over 2,500 degrees in two blast furnace-like cupolas that are fueled using coke. Once melted, the molten slag is dropped into a spinning device that separates the slag into thin fibers as it cools. The fibers are bound together using substances like cement and plaster, packaged into large blocks and shipped for use in large steel-framed building construction projects. Sulfur dioxide emissions from the cupolas are created by the melting of the slag using coke as fuel.

In 1982, Isolatek took over the manufacturing operations in Huntington Township, Indiana from Guardian Industries (also owned by U.S. Minerals). Because the mineral wool manufacturing operation had existed prior to 1980, the operation was considered "grandfathered" with respect to Clean Air Act New Source Review. However, because Isolatek, using IDEM's emission data, had and has an unrestricted potential to emit 380 tons per year of SO_2, the operation is considered a major existing source of SO_2 for purposes of Prevention of Significant Deterioration (PSD) permitting. As such, any construction or modification that Isolatek proposed or proposes to make at its facility must be permitted with federally enforceable limits that restrict the modifications' potential to emit to SO_2 to below 40 tons per year or the modification must undergo PSD review that includes a top-down analysis to determine Best Available Control Technology ("BACT").

Isolatek timely filed an application for a Title V Operating Permit in April of 1996 and IDEM, Office of Air Quality issued Isolatek's initial Title V Operating Permit on December 28, 1999. In November 2011, Isolatek submitted a construction permit application to IDEM, Office of Air Quality for two natural gas-fired mineral wool melters at the Huntington plant. Isolatek

accepted federally enforceable limitations in order to stay below the SO_2 significance threshold (PSD avoidance limits) and the construction approval required that Isolatek, within 180 days of startup of the second of the two natural gas-fired mineral wool melters, decommission and permanently shut down the two cupolas. *See* Title V Permit Significant Source Modification No. 069-30891-00021, Condition D.1.4(b)(5), Page 30 of 52. Permit available here.

Ultimately Isolatek constructed only one melter which was never operated because of startup issues. Isolatek's current Title V Operating Permit acknowledges the decommissioning of the wool melter project and Isolatek's resumed sole use of the two long-existing cupolas. *See* Title V Operating Permit No. 069-38295-00021, Technical Support Document, Page 2 of 32. Permit available here

III. EPA ENFORCEMENT AND ISOLATEK

Amidst this historical backdrop, on or around May 3, 2010 Isolatek received a Request for Information from EPA Region 5 that was issued pursuant to section 114(a) of the CAA, 42 U.S.C. § 7414(a) (Request). *See* Attachment 1. Isolatek provided the information listed in the Request and on February 7, 2011 EPA Region V issued a Notice of Violation and Finding of Violation (2011 NOV) to Isolatek's Huntington Township facility. *See* Attachment 2. The 2011 NOV stated that Isolatek had failed to apply and obtain a PSD permit prior to the construction and operation of an oxygen enrichment system at both its cupolas in 2005 because the project caused a "significant net emissions increase" at the Isolatek facility of SO_2, Total Reduced Sulfur and Carbon Monoxide (CO). *Id.* Later, on February 27, 2013 EPA Region V issued another Notice of Violation (2013 NOV) alleging that Isolatek's wool melter project that had been permitted by IDEM caused a "significant net emissions increase" of SO_2 in violation of PSD because Isolatek had failed to provide IDEM with facility specific SO_2 information for its emissions calculations and instead provided AP-42 emission factors. *See* Attachment 3. EPA based its allegation on "in-house" stack testing that Isolatek had conducted in December of 2007. *Id.* To date, the Region V enforcement actions against Isolatek have not been resolved by way of either an evidentiary hearing or Consent Agreement.

IV. EPA ENFORCEMENT INVOLVEMENT WITH DRR PROGRAMMATIC DECISION-MAKING

The air quality designations that are made pursuant to a change of a National Ambient Air Quality Standard are considered to be "nationally applicable regulations" under the oversight and purview of EPA Office of Air and Radiation's Office of Air Quality Planning and Standards ("OAQPS") at Research Triangle Park, North Carolina. 83 Fed. Reg. 1098, 1104 (January 9, 2018). However, implementation of the work to support the designations is performed by the EPA Regional Offices. This is also the case with respect to the promulgation versus implementation of the DRR. The EPA Regional Offices serve as the chief, and perhaps only, conduit to the states with respect to the development of a particular state's air quality designations as well as the implementation of the DRR in achieving its intended role with respect to that state's SO_2 area designations. For the State of Indiana, the EPA Region V Air Programs Branch acted either for or on behalf of OAQPS with respect to both the implementation of the DRR and in making the 2018 Designations.

In accordance with the requirements of the DRR, IDEM submitted a list to EPA before the deadline of January 15, 2016 that identified eleven sources in Indiana that had SO_2 emissions exceeding the 2,000 tons per year (tpy) annual threshold for the most recent years for which emissions data was available. *See* Attachment 4 (January 7, 2016 Letter to Hedman). On February 29, 2016 IDEM Office of Air Quality, Program Branch representatives received an email from John Summerhays, EPA Region V Air Programs Branch stating that EPA envisioned making additions to the list of sources subject to DRR—one of those additional sources being Isolatek.[2] *See* Attachment 5 (2-29-2016 Summerhays email with attachment). EPA Region V provided a separate attachment to the email which provided "more details" on why Isolatek warranted listing for DRR air quality characterization. *Id.* A close reading of this attachment indicates that the listing "recommendation" for Isolatek was provided by the Region V Air

[2] The other sources added to the list were five coal-fired electric utility sources subject to permanent SO_2 limits by virtue of a federal Consent Decree and two coal-fired utility sources that either shut down or converted to natural gas prior to the listing deadline. EPA asked that all the omitted utilities be added to the list even though IDEM had already provided EPA with DRR air quality characterizations for the "CD sources" and two of the utilities emissions were less than 2,000 tpy at the time of listing. Isolatek was the only source listed in the email that had never exceeded the 2,000 tpy threshold.

Enforcement and Compliance Assurance Branch, rather than OAQPS or the Region V Air Program Branch. *Id.*

The inclusion of Isolatek on the DRR list as a discretionary "source of concern" was based solely on information obtained by EPA Region V Enforcement as part of an enforcement initiative that has not been adjudicated. Beyond even that, the EPA's attachment raises unsubstantiated claims with respect to Isolatek's production rates, and thus SO_2 emissions. However, even with the inclusion of the unsubstantiated information provided by Region V Enforcement and characterized by Region V Enforcement, the SO_2 emissions of Isolatek (as alleged by EPA) totaled about 800 tons per year, or less than half of the threshold set out in the DRR. *See* 40 CFR 51.1202.

Representatives of IDEM told EPA that the inclusion of Isolatek on the DRR list for air quality characterization was inappropriate and that EPA should instead address its concerns with Isolatek through appropriate enforcement action. *See* Attachment 6 (March 4, 2016 email to John Summerhays with attachment). IDEM also pointed out that the inclusion of Isolatek was contrary to the express intent of the DRR to "prioritize the resources that will be devoted to air characterizations near SO_2 sources nationally" and that the 2,000 tpy threshold for air characterization "strikes a reasonable balance between the need to characterize air quality near sources that have a higher likelihood of contributing to a NAAQS violation and the analytical burden on air agencies." 80 Fed.Reg. 51061 (August 21, 2015). Then, on March 25, 2016 IDEM's Office of Air Quality received a letter from the EPA Region V Acting Regional Administrator, Robert Kaplan that formally responded to Indiana's January 7, 2016 list of sources to be characterized under the DRR.[3] *See* Attachment 7 (3-25-16 Letter from Kaplan to Baugues with Attachment).

Finally, in spite of IDEM's protestations,[4] EPA used the air quality characterization of Isolatek that was performed by the Region V Office of Enforcement and Compliance Assurance to make the SO_2 designation for Huntington Township and informed Indiana Governor Eric Holcomb of its intent to designate Huntington Township, Indiana as nonattainment for the 2018

[3] The attachment that discusses Isolatek is almost identical to the attachment to the February 29, 2016 email sent by John Summerhays to IDEM representatives but characterizes the preliminary modeling done by Region V Office of Enforcement and Compliance as "Modeling Evidence."

[4] *See generally* Attachment 11 (IDEM Letter to Kaplan, dated January 17, 2017 with Letter Attachment 3).

Designations by letter (120 day letter) dated August 22, 2017.[5] The 120 day letter was accompanied by a Technical Support Document, of which the portion pertinent to Isolatek and Huntington Township is attached (Isolatek TSD). *See* Attachment 8 (120 day letter with Isolatek TSD).

In the introduction to the Isolatek TSD the EPA states:

> The EPA exercised its discretion to list the Isolatek source as subject to the DRR. Indiana did not agree with the emissions or reasoning for listing the source as subject to the DRR. The state did not submit a modeling analysis for the area nor did the state install a new monitoring network to characterize air quality in the area. In the absence of a new monitoring network, the EPA must designate the Huntington County area by December 31, 2017. *Regardless of whether Isolatek was listed as subject to the DRR, this designation must reflect the best available information regarding air quality in this area.* At this time, the best available information regarding Huntington County air quality is the modeling that led the EPA to list Isolatek as subject to DRR requirements. Much of the following discussion reviews this modeling information that underpinned the EPA's decision to list Isolatek as subject to the DRR.
>
> Isolatek TSD p.29 (emphasis added).

In its discussion on air quality modeling analysis, the Isolatek TSD states:

> For this area, the EPA received no modeling assessments from Indiana or from any other party. *Thus, the only modeling presently available to the EPA for Huntington County is modeling which the EPA had already conducted during the course of enforcement action regarding the source*. The remainder of this section 4.3.2 describes and reviews this modeling.
>
> *Id.* (emphasis added).

Later in this discussion the EPA says:

> The EPA conducted the modeling of Isolatek in 2015 (*in conjunction with an enforcement investigation involving the source*), using AERMOD and AERMET versions 14134.
>
> *Id.* at 31 (emphasis added).

[5] EPA also informed Governor Holcomb that six counties or portions thereof would be designated as unclassifiable/attainment and that EPA had not completed review of a recently shared modeling protocol for Warrick County. While EPA approved of the Warrick County modeling protocol, EPA designated it as nonattainment until results from a modeling submittal could be reviewed to determine attainment.

A final pertinent comment in the Isolatek TSD is as follows:

> For the Huntington County area, the EPA only modeled the DRR source. The closest sources with SO_2 emissions greater than 100 tpy are approximately 30-35 km away and *include Thermafiber, Inc. with about 500 tpy*, and Steel Dynamics Incorporated with about 150 tpy. These sources are judged to have sufficiently low emissions that are sufficiently distant from the area of maximum concentrations so as to be likely to cause minimal concentration gradients in the area of interest.

Id. at 32 (emphasis added).

Thermafiber, Inc., like Isolatek, is a mineral wool manufacturer with reported emissions of SO_2 (500 tpy) *higher* than the 444 tpy[6] of SO_2 emissions that EPA found "represents the most reliable estimate of current emissions at Isolatek." *Id.* at 32, 36. The only critical difference between these two mineral wool manufacturers is that Isolatek had the misfortune of having two unresolved and, as yet, not adjudicated Notices of Violation issued by EPA Region V Office of Enforcement and Compliance Assurance.

V. ARGUMENT

A. THE LISTING OF ISOLATEK AS A "SOURCE OF CONCERN" FOR PURPOSES OF DRR CHARACTERIZATION WAS ARBITARY, CAPRICIOUS AND AN ABUSE OF DISCRETION

EPA conceived of the DRR in conjunction with the promulgation of the 2010 SO_2 NAAQS. The DRR addressed how the designations for areas would be implemented based on the fact that the national ambient SO_2 monitoring network had declined in numbers since its peak of approximately 1500 monitors in 1980 to the current size of 450 (as of June 2013). 79 Fed. Reg. 27446, 27449 (May 13, 2014). EPA pointed out that the reduction of the national monitoring network was due, in part, to the increasingly limited resources at the local, state and federal levels. *Id.* The DRR approach was developed to allow for a combination of monitoring and modeling of SO_2 emissions as was suggested in the preamble to the 2010 SO_2 NAAQS. *Id.*

[6] Given what information it had received from Region V enforcement staff, EPA finally decided on annual SO_2 emissions of 444 tpy. However, depending on the underlying assumptions used in the calculations, the Isolatek emissions could be 164 tpy, 444 tpy, 800 tpy or 1393 tpy. *See* Attachment 5 and Attachment 8 Isolatek TSD p.36.

Further, EPA recognized that the characterization of air quality in areas around more than 20,000 SO_2 sources nationally would not be feasible. *Id.* at 27450. Consequently, due to the still limited resources at the local, state and federal levels, the DRR provided a "threshold" approach for the inclusion of sources for modeling and/or monitoring in a manner that would achieve the "biggest bang for the buck" by focusing the limited resources "toward characterizing air quality in areas having the largest SO_2 emitting sources (and greater potential for relatively higher SO_2 concentrations) but may be lacking sufficient air quality data. *Id.* at 27453. Thus, the final DRR required each air agency to submit a list to EPA by January 15, 2016 that identified all sources within its jurisdiction that have SO_2 emissions that exceeded the 2,000 tpy annual threshold. 80 Fed. Reg. 51052 at 51053 (August 21, 2015). As is usually the case, the DRR also provided the requisite discretion for the air agency OR EPA to include on this list "additional sources and their associated areas" that also "warrant" air quality characterization. *Id.* This "discretion" to list sources below the threshold was discussed briefly in the preamble to the DRR where EPA stated:

> [T]he EPA recognizes that a variety of factors other than emission levels can influence the likelihood of NAAQS violations. As one example, source characteristics such as stack height[7] and plume buoyancy can significantly affect source impacts. As another example, clusters of multiple smaller sources that are in close proximity can cause as much impact as a single larger source. Finally, the EPA recognizes that a variety of other reasons may exist that may warrant further characterizing air quality in particular areas, which supports maintaining state and EPA Regional Administrator discretion to require air quality characterization in the area.

Id. at 51059 (citing 79 Fed. Reg. 27455 (May 13, 2014)).

There is nothing to suggest in the preambles to the proposed and final DRR that the discretion of the EPA Regional Administrator would extend so far as to include on the list for characterization a single SO_2 source in an area characterized as rural with emissions between one-fourth and one-fifth of the threshold solely due to unresolved and still unproven allegations put forth in Notices of Violation issued by the prosecutorial branch of EPA. The decision to include Isolatek seems particularly arbitrary in light of the fact that Indiana had ten SO_2 sources with higher annual SO_2 emissions; three located in significantly denser, "urban" population areas

[7] The Technical Support Document for EPA's 120 Day Letter stated that Isolatek's relatively short stack height was a concern. EPA also referred to Thermafiber, Inc. on page 36 (a mineral wool manufacturer with higher annual emissions than Isolatek) but did not make a similar observation despite the fact that the stacks at Thermafiber, Inc. were only nine feet taller than Isolatek's.

of which EPA did not require air characterization.[8] *See* Attachment 9. Yet, to IDEM's knowledge, there is no evidence that EPA Region V conducted its own modeling to characterize the air surrounding any of the other, larger SO_2 sources located in Indiana. This was only done for Isolatek and the modeling was conducted by Region V EPA enforcement personnel during an active enforcement case.

B. THE LISTING OF ISOLATEK AS A "SOURCE OF CONCERN" FOR PURPOSES OF DRR CHARACTERIZATION WAS THE RESULT OF INAPPROPRIATE COMMINGLING OF EPA'S PROSECUTORIAL AND REGULATORY FUNCTIONS AND CONSTITUTED A DENIAL OF DUE PROCESS

Since the early 1980s the EPA has been mindful of the concept of "commingling" of Agency functions. This was due primarily to an appeal by Bethlehem Steel Corporation ("Bethlehem") of the disapproval by EPA of a delayed compliance order ("DCO") that had been issued by the Indiana Pollution Control Board. *Bethlehem Steel Corp. v. United States Environmental Protection Agency*, 638 F.2d 994, 996 (7th Cir. 1980). The DCO would have allowed Bethlehem an extended period of time to comply with Indiana's state implementation plan. *Id.* Bethlehem contended that EPA's commingling of functions violated the Administrative Procedures Act and applicable provisions of due process. *Id.* at 1008. The court vacated EPA's disapproval of the DCO and stated that while review of Bethlehem's due process claim was "affected by the difficulty this court has encountered in obtaining Agency record," the practices used by EPA "cast a shadow over the appearance of fairness in EPA's review procedures utilized in the case" because enforcement attorneys with substantial and significant input into EPA's decision on the DCO were at the relevant time engaged in litigation with Bethlehem over the same issues.[9] *Id.* at 1009-1010.

After the *Bethlehem* decision, EPA General Counsel Robert M. Perry addressed the issue of "commingling" in a Memorandum dated March 29, 1982 to William A. Sullivan, Jr., EPA

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[8] IDEM conducted modeling and analysis of seven sources listed in Table 1of Attachment 9 due to their close proximity to DRR sources (over 2000 tpy SO_2). Modeling and analysis of SO_2 sources in this category was clearly contemplated within the clear language of the DRR.

[9] *See al so Marine Shale Processors v. United States EPA,* 81 F.3d 1371 (5th Cir. 1996). The court cites to Bethlehem for the required elements of inappropriate commingling.

Enforcement Counsel ("1982 Memorandum"). *See* Attachment 10. Perry stated in the 1982 Memorandum that:

> The goal of the separation of functions doctrine is to ensure fairness in decision-making by maintaining a distinction between adversarial advocacy functions, such as enforcement, and essentially "neutral" decision-making functions, such as agency adjudications and rulemaking. The enforcement function is prosecutorial: it involves asserting a position in an effort to obtain compliance with the law or to impose a sanction for violating the law. 5 U.S.C. §§ 551(10), 554(d). By contrast, the regulatory function involves essentially objective effort to "implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

1982 Memorandum at 8

Perry observed that steel "stretch out extensions" should be seen as an exercise of EPA's enforcement authority (and to be granted only through consent decrees) and he further noted that:

> Bethlehem involved a narrowly defined administrative regulatory function under §113(d)[10]; *the Agency's enforcement function was not part of the mandated review process*, and the court reacted strongly against what it perceived to be an *unfair commingling of enforcement and regulatory functions in which the Agency's regulatory decisions were improperly influenced by the desire to preserve the enforcement case.*

Id at 12. (emphasis added).

The involvement of Region V enforcement staff in the listing of Isolatek as a DRR source rises to, and likely exceeds the level of commingling of agency functions in *Bethlehem*. The Isolatek situation presents a clear inappropriate commingling of EPA Region V enforcement staff function and EPA Region V program staff function. The Region V enforcement staff had substantial and significant input in the decision by Region V program staff who were performing the rulemaking function of the application of the DRR with respect to source characterizations in conjunction with SO_2 air quality designations for areas on a nationwide basis. Region V enforcement staff were still engaged in its prosecutorial function with respect to Notices of

[10] It is understandable that Perry would describe the regulatory function as "narrowly defined" within the context of §113 since that section of the CAA is entitled "Federal Enforcement."

Violation issued to Isolatek alleging violations of PSD for significant increases in SO_2. The facts presented show that Region V enforcement is using the DRR to force Isolatek to install expensive SO_2 controls in lieu of taking its enforcement case to an evidentiary hearing before a trier of fact and law. To use the information that was gathered for enforcement purposes without the benefit of a hearing to properly adjudicate the facts constitutes a denial of due process for Isolatek to defend EPA's allegations of noncompliance. Further, because neither IDEM nor the State of Indiana were a party to the enforcement action, the imposition of an SO_2 nonattainment designation based on facts neither agreed to nor adjudicated amounts to a constitutional denial of due process to the State of Indiana with respect to the source listing process for the DRR as well as the designation process for the 2010 SO_2 NAAQS.

C. MODELING CONDUCTED BY REGION V EPA ENFORCEMENT AND SUBMITTED FOR DRR PURPOSES WAS NOT REPRESENTATIVE OF ISOLATEK'S OPERATIONS

As argued above, the State of Indiana and IDEM take the position that Isolatek should not have been placed on the DRR list for characterization of its emissions on air quality and that EPA's decision to make Isolatek a DRR source, through its enforcement branch, was arbitrary, capricious, an abuse of discretion and constituted a denial of due process for Isolatek and the State of Indiana. This being the case, EPA heaps insult to injury by using data inputs for its DRR modeling that were based on, at best, inadequate assumptions as well as the acceptance of an air quality characterization that does not comply with EPA's own DRR Modeling Guidance.

First, the data used by EPA Region V enforcement was based on information derived from a 2007 in-house stack test[11] that was performed as part of an engineering study done by Isolatek and performed under conditions that did not represent Isolatek's normal operational

[11] The stack test protocol was neither reviewed by IDEM Office of Air Quality, Compliance Data staff, nor was the test performed to demonstrate compliance with an SO_2 emission limitation. Subsequent in-house SO_2 stack testing at Isolatek indicates that the emissions are very close to the emission factor initially used in IDEM's permitting of the source and is in line with IDEM's estimate that Isolatek's annual actual emissions were much closer to 164 tpy than EPA's estimate of 444 tpy. *See* Attachment 12, Letter Attachment 3 at page 2 of 5.

conditions. *See* Attachment 11, (January 13, 2017 letter to Kaplan with Attachment 3 to letter); Attachment 3 p.2 of 5. IDEM had informed EPA of the inadequacy of the 2007 stack test data and pointed out the problems with the 2007 stack test conditions such as the idling of the cupola for 3 hours prior to the test, abnormal increased coke consumption and slower melt rate. *Id.* IDEM also pointed out that the stack test protocol had not been reviewed and approved by IDEM OAQ Compliance Data Section and that IDEM had not been given the opportunity to observe the test. *Id.* In short, if the findings of the 2007 stack test would have been reviewed by IDEM OAQ's Compliance Data Section, the testing would have been considered invalid for either compliance determination purposes or the establishment of an SO_2 emission rate to determine annual SO_2 emissions for Isolatek due to the inadequacies of the process on the front end, prior to the testing.

Second, the EPA Region V enforcement modeling does not comply with the guidance that is specific for DRR sources in several ways. *See* SO_2 NAAQS Designations Modeling Technical Assistance Document, August 2016 (https://www.epa.gov/sites/production/files/2016-06/documents/so2modelingtad.pdf) and Clarification on the AERMOD Modeling System Version for Use in SO_2 Implementation Efforts and Other Regulatory Actions, March 8, 2017 (https://www3.epa.gov/ttn/scram/guidance/clarification/SO2_DRR_Designation_Modeling_Clarificaiton_Memo-03082017.pdf) (Collectively, the "DRR Modeling Guidance"); *see also* EPA, OAQPS PowerPoint presentation for air agencies: https://www.epa.gov/sites/production/files/2017-02/documents/overview_webinar_drr_final_rule.pdf.

EPA Region V enforcement used an older version of AERMOD (14134) instead of the most current version (v16216r) and used an older version of AERMET (14134) instead of the most current version (v16216). The DRR Modeling Guidance required use of the most current version of AERMOD and AERMET. EPA Region V enforcement used five years of meteorological data spanning 2008-2012 along with non-concurrent emissions data,[12] which is inconsistent with

[12] The data inputs and modeling conducted was more akin to that associated with analysis in New Source Review in that some of the modeling data inputs and time period selected was for the five years prior to a 2012 modification by Isolatek that EPA alleged violated PSD.

DRR Modeling Guidance stating that three years of meteorological data *concurrent* with emissions should be used in order to agree with the three-year average form of the SO_2 NAAQS. Under the DRR, modeling should have been performed using meteorological data from 2013-2015 (inclusive) or 2014-2016 (inclusive). Further, the EPA enforcement modeling did not characterize the three most recent years of operation that is required in the DRR Modeling Guidance and reflects the intent to capture, through modeling, what monitoring data would have had a monitoring network been present in the area. Additional inadequacies of the EPA Region V enforcement modeling and analysis that are contrary to either requirements or recommendations in the DRR Modeling Guidance are: 1) including source characteristics that are inconsistent with actual source characteristics,[13] 2) not using readily available adjusted hourly seasonal SO_2 background for Isolatek as the DRR Modeling Guidance had recommended for DRR sources, and 3) not using an adjusted surface friction velocity (ADJ_U*).[14] IDEM had informed EPA of the technical inadequacies of the EPA Region V enforcement modeling on several occasions, culminating in a final plea by IDEM that Isolatek was inappropriately listed as a DRR source in the first instance and that the source analysis input data and associated modeling was egregiously flawed. *See* Attachment 12 (IDEM October 18, 2017 response to 120 day letter/Isolatek TSD).

IDEM and the State of Indiana believe that the EPA Region V enforcement modeling simply does not provide data of a quality upon which to base an area air quality designation. In fact, if Indiana had submitted modeling that is comparable to the enforcement modeling used for Isolatek as support for any other Indiana area designation as "attainment" under the DRR, EPA would have been obligated to find such modeling inadequate to support a determination because the modeling was not performed in accordance with the DRR Modeling Guidance. And in spite

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[13] This included the characteristics of Isolatek's blow chambers/screenhouses and the release heights and vertical/horizontal dimensions of each blow chamber/screenhouse.

[14] This option was not available at the time of EPA Region V enforcement's modeling which underscores the fact that it was conducted prior to the proposed DRR.

of this irony, EPA made a *nonattainment* designation for SO_2 for Huntington Township based on outdated modeling and meteorological computer programs using faulty data inputs and conducted in a mode and manner that is contrary to DRR Guidance.

Finally, EPA's explanation for its designation of Huntington Township is as follows:

> The EPA exercised its discretion to list the Isolatek source as subject to the DRR. Indiana did not agree with the emissions or reasoning for listing the source as subject to the DRR. The state did not submit a modeling analysis for the area nor did the state install a new monitoring network to characterize air quality in the area. In the absence of a new monitoring network, the EPA must designate the Huntington County area by December 31, 2017.
>
> Attachment 8, Isolatek TSD p.29

Even though the suggestion that Indiana prioritize its limited resources to conduct modeling or set up a new monitoring network in order to rebut inappropriately used and faulty data flies in the face of the intent of the DRR, EPA goes on to state:

> Regardless of whether Isolatek was listed as subject to the DRR, this designation must reflect the best available information regarding air quality in this area. At this time, the *best available information* regarding Huntington County air quality is the modeling that led the EPA to list Isolatek as subject to the DRR requirements.
>
> *Id.* (emphasis added)

EPA's approach in making a designation of nonattainment based on the EPA Region V enforcement modeling is clearly erroneous and appears to derive from a tortured construction of "weight of evidence" as used in its scientific or technical determinations. The "best available information" can also be "critically flawed" information that does not, in fact inform. EPA should look at the information presented to it by EPA Region V enforcement, consider the rebuttal arguments of IDEM as to its inappropriate use and flawed content and make the correct determination that Huntington Township be designated as unclassifiable.

VI. CONCLUSION

The EPA's decision to identify Isolatek, a single SO_2 source located in a rural area and with emissions between one-fourth and one-fifth of the threshold 2,000 tpy, as a "source of concern" under the DRR was arbitrary and capricious and an abuse of its discretion. This approach was not consistently applied by EPA to other similarly situated sources, including similar or larger sources located in Indiana. The data used by EPA in making this decision was based on modeling data that is more appropriate for NSR, was based on testing performed during abnormal operating conditions, and was therefore not representative of Isolatek's operations. The empirical evidence demonstrates that EPA's decision to rely on this flawed data was the result of impermissible commingling of its enforcement and regulatory functions, depriving both Isolatek and the State of Indiana of due process. This decision will likely result in Isolatek, a longstanding business, to permanently shut down or for Huntington Township be permanently designated as nonattainment for SO_2.

For all of the reasons stated above, the State of Indiana and IDEM respectfully request that you reconsider the decision to designate Huntington Township, Huntington County, Indiana as nonattainment for the 2010 SO_2 NAAQS and instead direct that this Indiana township be designated as unclassifiable. The State of Indiana and IDEM also respectfully request that the current designation of nonattainment be stayed as to its effective date, April 9, 2018, pending reconsideration.

Respectfully submitted,

Eric J. Holcomb
Governor

Bruno Pigott
Commissioner
Indiana Department of Environmental Management

SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. BOX 7863
MADISON, WI 53707

February 28, 2018

Administrator Pruitt
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington DC 20004

Dear Administrator Pruitt,

Thank you for the opportunity to address you on the important issue of ozone attainment in Wisconsin. Cooperative federalism between the states and the Environmental Protection Agency (EPA) should be a guide when implementing the Clean Air Act. The act gives states the authority to recommend designations and provide information for EPA to consider in the designation process.

Unfortunately, nine counties in Wisconsin have been proposed as full or partial non-attainment. My administration has long held that the entire state of Wisconsin should be designated as being in attainment. If that is not possible then the EPA should use data and science to determine the narrowest boundary for any nonattainment area.

Wisconsin has cut emissions of nitrogen oxides and volatile organic compounds in half since 2002. Wisconsin's nonattainment areas are caused by emissions occurring outside of our state that are transported along Lake Michigan. The potential nonattainment designations impose a heavy regulatory load on businesses and industry, and as such, the manufacturers, employers, and citizens of Wisconsin should not be unfairly burdened by this unnecessary regulation.

EPA's intended designations threaten the well-being of the state's economy for little to no environmental benefit. In fact, the Department of Natural Resources has used data and modeling to show that the vast majority of emissions leading to nonattainment come from out-of-state.

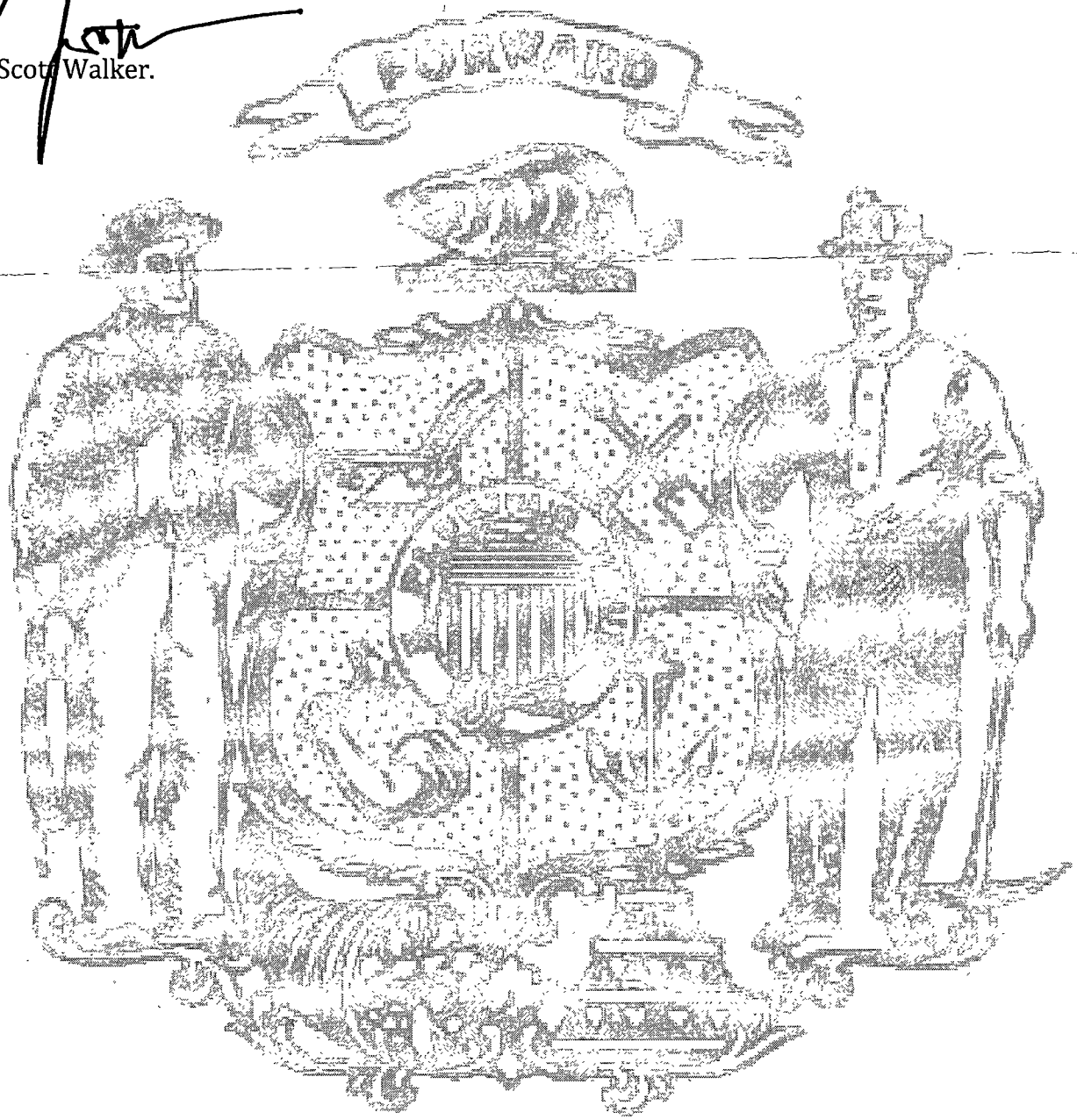
Attainment designation is an important issue to both existing businesses and future development in the State of Wisconsin, along the entire Lake Michigan shoreline. We have made great progress in reducing ozone levels and expect that ozone levels will continue to decrease. The EPA should consider the data and science that the Wisconsin Department of Natural Resources has compiled, the state's decreasing emissions, and the impact that a nonattainment designation will have on the economy.

The EPA should designate all of Wisconsin as attainment for the 2015 ozone standard. If, contrary to this recommendation, the EPA designates a portion of the state as

nonattainment, the area so designated should be the smallest possible based on data and science.

Thank you

Scott Walker.



OFFICE OF THE GOVERNOR
P.O. BOX 7863
MADISON, WI 53707
608-266-1212

MATTHEW H. MEAD
GOVERNOR

THE STATE OF WYOMING

2323 Carey Avenue
CHEYENNE, WY 82002

Office of the Governor

February 26, 2018

Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 1101A
Washington, DC 20460

Re: EPA-HQ-OAR-2017-0545 State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units – Advanced Notice of Proposed Rulemaking

Dear Administrator Pruitt,

I appreciate the opportunity to provide comments on the Environmental Protection Agency's (EPA) advanced notice of proposed rulemaking on State Guidelines for Greenhouse Gas Emission from Existing Utility Generating Units (Proposal). Wyoming state agencies will also submit comments, which are incorporated by reference. As a result of its revised legal analysis, the EPA is appropriately reviewing how regulations have been promulgated under Section 111(d) of the Clean Air Act in the past. Wyoming remains concerned about EPA's authority to issue a regulation directed at power plants under Section 111(d).

The EPA must define the appropriate roles for the agency, states and affected parties when considering a new regulation. The EPA's responsibility is to determine actions that can be taken to reduce emissions, such as the appropriate technologies and best practices to reduce CO2 emissions. The EPA, then, has certain enforcement authorities in the event a state does not submit a satisfactory plan of action.

States have primary authority to determine what combination of technologies and best practices are appropriate at individual power plant units. Section 111(d) is intentionally written to give state's broad latitude in creating a plan. This Section addresses existing facilities with a finite life and that are able to absorb certain threshold of costs before becoming uneconomic. To avert premature closure, states are allowed to incorporate aspects specific to the state and to the power plant. This authority is necessary and must continue. The EPA must recognize that equipment depreciates over time. The EPA must contemplate the relationship between the level of emission reductions achievable over the life of a power plant and the cost of maintaining emission control technologies as they depreciate.

PHONE: (307) 777-7434

FAX: (307) 632-3909

Once a state has determined the level of emission reduction achievable at each individual unit, the state should have discretion to determine the appropriate way to meet emission reductions. The EPA stated in the advanced proposal that it believes carbon capture is not a viable technology in CO2 emission reductions and EPA should not compel this type of investment by utilities and ratepayers. However, the EPA should allow states to use this technology as an option if they choose. This option should be on the table to provide opportunities to further deploy carbon capture, utilization and storage (CCUS) technology. These decisions should be made by a state, not required by the EPA.

Again, I have reservations about EPA's authority to issue a regulation directed at power plants under Section 111(d). The Agency finalized regulations under Section 112 in 2011. The Agency is not allowed to regulate under both Section 111(d) and Section 112. Additionally, to regulate under Section 111(d), the Agency must first set lawful requirements for new power plants under Section 111(b). Currently, the EPA requires new power plants install partial carbon capture technology under Section 111(b). Technologies required under this Section must be adequately demonstrated, economic and commercially viable. Carbon capture technologies have not yet advanced to that point, which is one reason the EPA's regulation is not appropriate under the law. A precedent to the EPA being able to issue standards for existing sources under Section 111(d) is that the Agency first establish a lawful regulation under Section 111(b) for new sources. The EPA has failed to complete this compulsory step, prohibiting the Agency from regulating existing sources. The EPA should finish its review of Section 111(b).

Wyoming is the largest coal-producing state. Wyoming is also a leader in advanced technologies to capture carbon from existing power plants. I stand ready to work with the EPA to develop a path forward that keeps coal, natural gas and all other options on the table.

Sincerely,

Matthew H. Mead
Governor

MHM:dp

cc: The Honorable Mike Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Liz Cheney, U.S. House of Representatives